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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CARLOS G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. CARLOS G., Defendant and Appellant.	D070047 (Super. Ct. No. J238054)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore Cropley and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Carlos G. appeals from the juvenile court's true findings on two counts alleged in a delinquency petition: misdemeanor sexual battery (Pen. Code, § 243.4, subd. (e)(1))[1] and battery (§ 242). He contends there is insufficient evidence to support the court's true findings on both counts. Carlos also contends the court erred in excluding the testimony of a character witness. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Miss W., was a teacher at 14-year-old Carlos's middle school. Carlos was not a student in her class, but she had seen him around campus and spoken to him a few times in passing. Around 5:30 p.m. on December 17, 2015, Miss W. was getting ready to leave campus. She noticed Carlos waiting in a common area outside of her classroom; he told her he was waiting for his sister. As Miss W. descended a staircase, Carlos followed her, indicating he would wait for his sister outside. Miss W. thought Carlos's behavior was a little strange, and she decided to try to "shake him off" by going to talk to some coworkers, including the school's vice-principal.

Less than five minutes later, Miss W. exited the building, and she saw Carlos standing on the front steps. There was no one else outside, it was dark, and it was unusual for a student to be waiting around at that time. She decided to walk to her car, which was parked on a street adjacent to the school. Carlos followed Miss W. to her car. She said, "I thought you were going to wait for your sister," to which he said, "No, that's fine." As they walked, Carlos asked where they were going. Miss W. responded, "We're

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1 Further undesignated statutory references are to the Penal Code.

not going anywhere. I'm going to my car." Carlos asked several times where her car was.

Once they reached the car, Miss W. used her remote control alarm, which unlocked all four car doors at the same time. As she was putting her bag in the backseat, Carlos tried to open the back door on the passenger side. That door did not work, so Carlos opened the front passenger door and got inside her vehicle. Miss W. told him to get out, and although he did not do so immediately, he eventually complied. Then, Carlos went to the driver side, where Miss W. stood. After she said she would not see him until after winter break, Carlos "hugged [her] from the front." Miss W. had never hugged him before and did not expect the hug. When Miss W. hugged other students, she only gave "side" hugs consistent with the school's practice. As Carlos hugged her, he slid one of his hands from the middle of her back down to the "crack of [her] buttocks." Miss W. felt very uncomfortable, but did not verbally object. Instead, she tried to get away by quickly sitting down in her car. She was unable to close the door because Carlos positioned himself in a way that prevented her from closing it.

Carlos asked Miss W. again when he would next see her, and she reiterated that it would be after winter break. He then leaned into the car, hovering over her, and hugged her a second time while she was seated. He slid one hand down Miss W.'s back and touched her "butt" where it was cushioned against the car seat. Miss W. was confused by the impropriety of Carlos's actions and felt incredulous, "like a deer in headlights." She waited for the hug to end, willed herself to remain calm, and did not protest because Carlos was physically bigger than her. As soon as she could, Miss W. shut the door and

locked it. Deciding it was best to stay in her car, she used her cell phone to call the vice-principal. The vice-principal ran outside to her car and observed Miss W. to be emotional and upset. Later that night, he called her and obtained the details regarding the incident.

The next morning, the vice-principal, principal, and a special education teacher, spoke to Carlos about what had happened the night before. Most of Carlos's story overlapped with Miss W.'s report. He initially said he followed Miss W. because he wanted to have fun and scare her. Carlos subsequently became emotional and admitted he followed Miss W. because he wanted to touch her. Carlos said he first developed the urge to touch her when he was waiting outside. Carlos described the area he touched during the second hug as the lower back, "behind region, [or] butt region."

A police officer also interviewed Carlos. According to the officer, Carlos told him he had "put his right hand very low on [Miss W.'s] back above her buttocks" during the first hug. Carlos admitted "kind of" trying to touch Miss W.'s buttocks, but said he decided not to. As to the second hug, Carlos told the officer he hugged her the way he did the first time, and again denied touching Miss W.'s buttocks. Carlos acknowledged to the officer that touching Miss W. in the way he did was inappropriate. Further, Carlos stated that touching a woman's "boobs, [] ass, and [] vagina" would be inappropriate.

The district attorney's office filed a Welfare and Institutions Code section 602 petition alleging two counts of misdemeanor sexual battery corresponding to the first and second hugs (§ 243.4, subd. (e)(1)) and one count of battery (§ 242).

After a contested hearing, the court made true findings on the count of misdemeanor sexual battery based on the second hug and the count of battery, but dismissed the count of misdemeanor sexual battery based on the first hug. The court found that Carlos honestly believed he had not touched Miss W.'s buttocks the first time, and as a result, it could not conclude beyond a reasonable doubt Carlos had touched Miss W. for the specific purpose of sexual gratification, arousal, or abuse. In contrast, when Miss W. was seated and in no way "desirous of a second hug," the court found that Carlos's sliding his hand "in between the buttocks [and] the car seat" was done for a specific sexual purpose. Carlos timely appealed.

DISCUSSION

I. *Sufficient Evidence Supports the Court's True Findings*

Carlos challenges the sufficiency of evidence to support the juvenile court's true findings. Specifically, as to misdemeanor sexual battery, Carlos contends insufficient evidence supports he touched Miss W.'s buttocks during the second hug. Additionally, as to battery, Carlos contends he reasonably believed Miss W. consented to being hugged, which would have rendered any touching lawful or inoffensive. We reject these arguments.

A. *Governing Law and Standard of Review*

1. *The Law Governing Challenges to the Sufficiency of the Evidence*

"A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason." (*People v. Rowland* (1992) 4 Cal.4th 238, 269, citing *Jackson v. Virginia* (1979) 443 U.S. 307,

313-324.) In determining the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, at p. 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The same test for sufficiency of evidence used in adult criminal trials applies to our review of juvenile proceedings involving criminal acts. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.)

2. *The Offense of Misdemeanor Sexual Battery*

Section 243.4, subdivision (e), provides in relevant part: "(1) Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery . . . . [¶] (2) As used in this subdivision, 'touches' means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." As used in section 243.4, an " '[i]ntimate part' means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (§ 243.4, subd. (g)(1).)

3. *The Offense of Battery*

Section 242 defines a "battery" as "any willful and unlawful use of force or violence upon the person of another." (§ 242.) " 'Any harmful or offensive touching

constitutes an unlawful use of force or violence' under this statute. [Citations.] 'It has long been established that "the least touching" may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark.' [Citations.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 404-405.) A defendant's reasonable belief that the victim consented to the touching may be a defense to battery, but only in situations involving ordinary physical contact or blows incident to sports. (See *People v. Rivera* (1984) 157 Cal.App.3d 736, 742; *People v. Samuels* (1967) 250 Cal.App.2d 501, 513.)

B. *Analysis*

Relying on his statements to law enforcement, Carlos argues he did not touch Miss W.'s "buttocks" as the term is commonly defined. The other elements of sexual battery are not in dispute. We conclude substantial evidence supports the juvenile court's true finding Carlos committed misdemeanor sexual battery during the second hug. Miss W.'s testimony, and reasonable inferences drawn therefrom, support that Carlos touched her buttocks when he hugged her the second time while she was seated. She testified that Carlos "had his hand and he slid it down my back and in between my butt and the cushion of the car seat." For Carlos to place his hand in between Miss W.'s "butt" and the seat cushion, he necessarily touched her buttocks. The relevant statute does not require the perpetrator to touch a specific spot on the buttocks, and the court believed Miss W.'s testimony regarding where she was touched—her "butt." "The testimony of one witness, even that of a party, may constitute substantial evidence." (*In re Marriage*

of Fregoso and Hernandez (Oct. 21, 2016, D069614) __ Cal.App.4th __ [2016 Cal.App. Lexis 990, *8].)

Substantial evidence also supports the juvenile court's true finding on battery. Miss W.'s lack of consent to being touched in an intimate manner by Carlos may be inferred from her conduct and the circumstances. Miss W. and Carlos had no relationship, had not touched each other previously, and she was trying to distance herself from him. Carlos could not have reasonably believed she consented to having him slide his hand from the middle of her back to her buttocks (or an area right above her buttocks) while hugging her. Indeed, he readily admitted he had touched Miss W. in an inappropriate way, indicating his awareness the touching was offensive.

Sufficient evidence supports the juvenile court's true findings.

II. *The Court Did Not Err in Excluding the Testimony of a Character Witness*

Carlos contends the court erred in excluding the testimony of his proposed character witness under Evidence Code section 1102 and thereby deprived him of his constitutional right to call witnesses.[2] We set forth additional background before analyzing his contention.

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2 He also argues the character evidence could not be excluded under Evidence Code section 352. The juvenile court did not exclude the witness's testimony under that section, and thus, we have no occasion to discuss his argument on that point.

A. *Additional Background*

In Carlos's trial brief, he listed one name as a proposed witness: Patricia Bonilla. The prosecution filed a motion in limine to exclude irrelevant character evidence pursuant to Evidence Code sections 1101 and 1102.

At the hearing on motions in limine, Carlos's counsel stated Bonilla was a "character witness we're bringing and she's going to be disclosing some of her opinion of Carlos . . . ." The court asked what the character witness would specifically testify about, to which counsel indicated she would testify about Carlos's generally good character. The prosecutor argued that the issue of whether Carlos was a "good kid or a bad kid" was not relevant to whether he committed sexual battery, the prosecution did not intend to introduce any character witnesses or impugn Carlos's character, and the Evidence Code did not permit witnesses to opine on whether a person is "good or bad" under the circumstances where there was no suggestion Carlos was predisposed to committing the charged offenses. Carlos's trial counsel repeated the witness would "talk[] about [Carlos's] character[,]" which she contended was permitted under Evidence Code section 1102, subdivision (a), because the charged offenses went "against his character overall."

The court decided to exclude the proffered character evidence. The court stated: "Based on the charging document and my understanding of the evidence, I don't find that the character evidence would be relevant unless this is a person who is going to speak toward [the] sexual proclivities of the minor . . . ."

B. *Governing Law and Standard of Review*

Evidence Code section 1102 provides in part: " 'In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1305 (*McAlpin*).) It " 'allows a criminal defendant to introduce evidence, either by opinion or reputation, of his character or a trait of his character that is 'relevant to the charge made against him.' [Citation.] Such evidence is relevant if it is inconsistent with the offense charged—e.g., honesty, when the charge is theft—and hence may support an inference that the defendant is unlikely to have committed the offense." (*Ibid*; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1118 ["A defendant may introduce opinion evidence of his or her character to show a nondisposition to commit an offense."].)

While "specific instances of conduct" are not admissible under Evidence Code section 1102 (*People v. Felix* (1999) 70 Cal.App.4th 426, 431), "[l]ay opinion testimony is admissible under section 1102 when it is based on the witness's personal observation of the defendant's course of behavior. [Citation.]" (*Id.* at p. 430; see *McAlpin, supra,* 53 Cal.3d at pp. 1309-1310.)

McAlpin describes the framework through which a criminal defendant may introduce character evidence in the form of a lay opinion. There the defendant was charged with committing lewd conduct with the daughter of a woman he had been dating. (*McAlpin, supra*, 53 Cal.3d at p. 1294.) At trial, the defendant offered several witnesses

to testify to his good character, including two women he had previously dated who also had daughters. (*Id.* at p. 1305.) In part, these two witnesses "proposed to testify that in the course of their relationship with defendant they observed his conduct with their daughters and saw no unusual behavior either by defendant or by their daughters, and that it is their opinion, based on those personal perceptions, that defendant is not a person given to lewd conduct with children." (*Id.* at p. 1309.) The trial court excluded this testimony on the ground it sought to prove the defendant's character trait by means of specific acts. (*Ibid.*)

Although affirming the defendant's conviction, the Supreme Court concluded the trial court erred by excluding the women's proffered testimony. (*McAlpin*, *supra*, 53 Cal.3d at pp. 1310, 1313.) The Court discussed: "A fair reading of the offer of proof shows that the women witnesses would not have limited their testimony to specific instances in which defendant had the opportunity to, but did not, molest their daughters. Instead, the witnesses proposed to testify that they observed defendant's behavior with their children throughout the course of their relationship with him, and their opinion that he is not a person given to lewd conduct with children arose from that experience as a whole. Thus viewed, the proffered testimony was intended to prove the relevant character trait not by specific acts of 'nonmolestation,' but by the witnesses' opinion of that trait based on their long-term observation of defendant's course of consistently normal behavior with their children." (*Id.* at pp. 1309-1310, fn. omitted.)

We review a trial court's evidentiary rulings for abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 437.)

C. *Analysis*

In contrast to *McAlpin*, the trial court did not abuse its discretion here. Initially, we observe deficiencies in Carlos's offer of proof. His counsel did not expound on details of Bonilla's proposed testimony, how Bonilla knew Carlos, or any basis for her opinion of his good character. Our analysis is necessarily constrained. For example, the record does not disclose whether Bonilla sought to testify about merely specific instances of observing Carlos's interactions with other women, or, whether she had a long-term relationship with him sufficient to opine on a relevant character trait.

Moreover, on this record, we agree with the People that being "good" is too vague a character trait to be relevant to the charged offenses. (See *McAlpin*, *supra*, 53 Cal.3d at p. 1311 [construing a proffered opinion on defendant's "high moral character" to refer to *sexual* morality, and so construed, finding the trait relevant to a sex offense charge]; *People v. Qui Mei Lee* (1975) 48 Cal.App.3d 516, 526 ["The character or character trait must, of course, be relevant to the offense charged."].) Evidence that Carlos was "good" is not inconsistent with the charged offenses considering his age and immaturity, and would not have been relevant to a disputed issue. The juvenile court left open the possibility of admitting an opinion that Carlos did not have the sexual proclivity to commit the charged offenses, but counsel offered no rejoinder. Accordingly, the court did not err in excluding the proffered opinion of Carlos's character witness.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.